

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 23953-5-III

Respondent,

Division Three

v.

D'ANGELIA L. ANDERSON,

UNPUBLISHED OPINION

Appellant.

SCHULTHEIS, J. — Acting on a tip from an anonymous caller to Crime Stoppers, Wenatchee police officers executed a search warrant at the home of D'Angelia Anderson. Many drug-related items were found in open view, and Ms. Anderson was charged with one count each of possession of cocaine and possession of methamphetamine. Her motion to suppress this evidence as the fruits of an unlawful search was denied. At trial, she claimed unwitting possession. The jury found her guilty of both charges.

On appeal, Ms. Anderson contends (1) the search warrant was not based on probable cause because the affidavit did not establish the informant's credibility; (2) the

officers did not properly knock and announce before entering her residence; and (3) the prosecutor violated due process by misstating Ms. Anderson's burden of proof on the element of knowledge. Finding no error, we affirm.

Facts

Crime Stoppers is a service provided by some police departments that offers anonymity and a cash reward to callers who give information that proves reliable on criminal activity. When people call the Crime Stoppers number, they are given identification numbers so they can be identified if they call again. On July 9, 2004, a woman called the Wenatchee Crime Stoppers and reported that a suspect with an outstanding arrest warrant could be found at 69 Simmons Street. She also stated that there were several guns at that residence. Officer Randy Chapman, who took the call, recognized the woman's voice and her caller identification number as belonging to a caller who had given reliable information leading to an arrest and payment of a reward approximately three months earlier. Further investigation confirmed that the person reportedly at 69 Simmons Street had an outstanding arrest warrant and was associated with both 65 and 69 Simmons Street (69 Simmons Street is a manufactured home on the property of 65 Simmons Street).

On July 13, 2004, the informant again called Crime Stoppers and talked to Officer Chapman. She reported that earlier that day she had been at 65 Simmons Street

and had seen convicted felon Hipolito Gonzalez-Guzman Sr. at the residence with two silver pistols. The caller also stated that Mr. Gonzalez-Guzman Sr., her drug dealer, declared that if police officers came to the house, “he’d go down in a blaze of glory.” Clerk’s Papers (CP) at 119. Officer Chapman confirmed that Mr. Gonzalez-Guzman Sr. lived at 65 Simmons Street, was a convicted felon, and was wanted for escape from community custody. He also determined that three other people who reportedly lived at 65 and 69 Simmons Street—including the suspect mentioned in the informant’s July 9 call, as well as Hipolito Gonzalez Jr. and Felisha Gonzalez—had active warrants. Based on this information, police officers obtained a warrant on July 14 to search both 65 and 69 Simmons Street for Mr. Gonzalez-Guzman Sr., the two pistols, and any of the other named suspects with outstanding warrants.

SWAT team officers executed the warrant at around 6:30 a.m. on July 15. Officer Marcus Harris pounded on the wall next to the front door, announced “Police,” and then yelled, “Search Warrant” and “Open the door.” CP at 59. After counting 10 seconds and hearing no movement inside, Officer Harris again pounded on the side of the house and announced “Police, search warrant, open the door.” CP at 60. He noticed that the front door was not completely shut. When no one had answered the second knock-and-announce after another 10 seconds, Officer Harris pushed open the door and stepped into the house. There he discovered two

people standing in the living room. He and another officer then opened a bedroom door and found Ms. Anderson standing near the foot of her bed. They thought they saw her throw something from her hand. The officers found her son, Mr. Gonzalez Jr., under her bed near a firearm.

A glass narcotics pipe and a silver spoon surrounded by white powder were found on the bedroom floor in the area where Ms. Anderson had appeared to throw something. The officers found another glass pipe on the floor as well. On the basis of this evidence and the firearm, the officers obtained an amended warrant to search for evidence of narcotics. In the subsequent search of Ms. Anderson's bedroom, the officers additionally found a bindle of white powder, a snorting tube, and a chunk of suspected controlled substances on the floor. Another snorting tube was found in the dresser drawer and a bindle was found in a jewelry box. Tests of the substances indicated the presence of methamphetamine and cocaine.

Ms. Anderson was charged by amended information with one count of possession of methamphetamine (RCW 69.50.4013(1)) and one count of possession of cocaine (RCW 69.50.4013(1)). She moved pursuant to CrR 3.6 for suppression of the evidence, challenging the basis of the search warrant and its execution. At the hearing on the motion held in December 2004, defense counsel stated that a judge in an earlier "threshold hearing" on the motion had rejected all arguments other than the knock-and-

announce issues. Report of Proceedings (RP) (Dec. 16, 2004) at 3. After hearing argument, the trial judge concluded that the officers complied with the knock-and-announce statute, RCW 10.31.040, when they executed the warrant.

At trial, Ms. Anderson denied any knowledge of the items found in her room and claimed she did not know that her son was hiding under her bed. Her defense was that the items found in her bedroom belonged to her son. The jury was instructed that it was permitted to infer knowledge under certain circumstances:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Instruction 14, CP at 50. The jury was also instructed that a person is not guilty of possession of a controlled substance if the possession is unwitting, meaning “if a person did not know that the substance was in his or her possession or did not know the nature of the substance.” Instruction 15, CP at 51. This instruction continued by stating that the defendant has the burden of proving by a preponderance of the evidence that the substance was possessed unwittingly.

During closing argument, the prosecutor quoted from these instructions and

argued that common sense led to the inescapable conclusion that Ms. Anderson knew or should have known that the narcotics and paraphernalia were in her bedroom. He argued that any reasonable person under the circumstances would have known the items were there. He concluded by stating, “She has to prove that she didn’t know. But it goes beyond that, that a reasonable person in her place also would not have known.” RP at 296. The jury found her guilty of both charges and she timely appealed.

Credibility of the Confidential Informant

Ms. Anderson first contends the affidavit in support of the search warrant did not set forth sufficient facts for the magistrate to determine the credibility of the confidential informant. The standard of review is abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). This court gives great deference to the magistrate’s determination of probable cause, resolving all doubts in favor of the warrant’s validity. *Id.*

Initially, we must address the State’s contention that Ms. Anderson effectively waived argument on this issue because she did not insist on a ruling by the trial court. The record shows that Ms. Anderson moved to suppress based on three arguments: (1) the warrant failed to establish the veracity of the informant or the basis for the informant’s belief that Mr. Gonzalez-Guzman Sr. and the firearms were at the residence; (2) the search warrant was overly broad; and (3) the warrant was improperly executed.

The trial court never issued a ruling or order on the first two issues. According to defense counsel's statement at the hearing on the remaining suppression issue, "most of the issues were resolved by Judge Allan at the threshold hearing. I think the only thing we're here for today is the knock and announce part of it, so I think she pretty much kicked me out the door on that other stuff." RP (Dec. 16, 2004) at 3. No other discussion of the warrant issues is contained in the record. In the findings and conclusions entered after the suppression hearing, the trial court addressed only those facts and conclusions related to the execution of the search warrant.

CrR 3.6(a) provides that the trial court considering a motion to suppress first determines whether an evidentiary hearing is required, based on the moving papers. If the court decides no hearing is required, it must enter a written order setting forth its reasons. CrR 3.6(a). When an evidentiary hearing is conducted, the court must enter findings of fact and conclusions of law. CrR 3.6(b). Contrary to the State's position, the trial court was not required to enter findings and conclusions regarding the warrant issues, because those issues were not considered at the evidentiary hearing. Although the trial court should have entered a written order explaining why a hearing was not necessary on the warrant issues, the court's failure to comply with CrR 3.6(a) does not constitute a waiver of *the defendant's* right to review of those issues. All of the facts that were before the superior court and the magistrate—contained in the affidavit in

support of the search warrant—are now before this court. Those facts are reviewed de novo to determine whether probable cause supports a search warrant. *State v. Boyer*, 124 Wn. App. 593, 605, 102 P.3d 833 (2004), *review denied*, 155 Wn.2d 1004 (2005).

A search warrant must be issued upon a finding of probable cause based on facts sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of that criminal activity exists at a certain location. *Id.* at 604; *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002) (citing the warrant clause of the fourth amendment to the United States Constitution and article I, section 7 of the Washington Constitution). “In determining probable cause, the magistrate makes a practical, commonsense decision, taking into account all the circumstances set forth in the affidavit and drawing commonsense inferences.” *Maddox*, 152 Wn.2d at 509.

When an affidavit in support of a search warrant is based on information from a confidential informant, the magistrate must apply the two prongs of the *Aguilar-Spinelli* test to determine whether the facts demonstrate the informant’s (1) basis of knowledge, and (2) credibility. *Vickers*, 148 Wn.2d at 112 (citing *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964)); *Boyer*, 124 Wn. App. at 605. Although the State must establish both prongs of the test, independent police investigation that corroborates the tip may cure any deficiency. *Vickers*, 148 Wn.2d at 112; *Boyer*, 124 Wn. App. at 605.

Ms. Anderson challenges only the credibility prong of the *Aguilar-Spinelli* test. She argues that the informant's information was inherently unreliable because the informant was unknown to the police and the magistrate. To satisfy *Aguilar-Spinelli*, an affidavit in support of a search warrant must set forth facts and circumstances that allow the magistrate to conclude the informant was credible. *Vickers*, 148 Wn.2d at 112. If the identity of the informant is not revealed to the magistrate, reviewing courts require a heightened demonstration of the informant's veracity. *Boyer*, 124 Wn. App. at 605. This rigorous test protects against the meddling of an anonymous troublemaker who is involved in the criminal enterprise or who is motivated by self-interest. *Id.*

Here, several facts contained in the affidavit support the confidential informant's credibility. First, the affidavit states that the officer who answered the Crime Stoppers call recognized the caller as the informant who had provided accurate information three months earlier. This previous tip led to an arrest. As noted in *State v. Salinas*, 119 Wn.2d 192, 200-01, 829 P.2d 1068 (1992), an informant's credibility is sufficiently established by his or her "track record," meaning accurate information in the past that led to arrests and convictions. This informant had a track record that supported her credibility. Second, an independent police investigation corroborated the information supplied by the informant, including the fact that certain residents at 65 and 69 Simmons Street had outstanding arrest warrants. Third, the informant stated that Mr.

Gonzalez-Guzman Sr., a felon who illegally possessed firearms, was known to her because he was her drug dealer. An informant's statements against penal interest support an inference of reliability. *State v. Lair*, 95 Wn.2d 706, 711, 630 P.2d 427 (1981).

Because the facts contained in the affidavit satisfy the veracity prong of the *Aguilar-Spinelli* test, the affidavit establishes probable cause to support the warrant. *Boyer*, 124 Wn. App. at 605. The trial court did not abuse its discretion in denying the motion to suppress the evidence on the basis of the warrant's validity.

Knock and Announce Procedure

Ms. Anderson next contends the police officers conducted an unlawful search because they did not wait a reasonable time after knocking and announcing their purpose before entering the residence. RCW 10.31.040, the knock and announce rule, provides that police are required to knock, announce their identity and purpose, and wait a reasonable length of time for the occupants to voluntarily admit them.¹ *State v. Cardenas*, 146 Wn.2d 400, 411, 47 P.3d 127, 57 P.3d 1156 (2002); *State v. Johnson*, 94 Wn. App. 882, 889, 974 P.2d 855 (1999). After a reasonable wait, the police are

¹ In its entirety, the statute provides: "To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance." RCW 10.31.040.

allowed to make a forcible entry. RCW 10.31.040; *Johnson*, 94 Wn. App. at 890.

Whether an officer waited a reasonable time before entering a residence depends upon the circumstances of each case. *State v. Richards*, 136 Wn.2d 361, 374, 962 P.2d 118 (1998). We defer to the trial court's resolution of this issue because it is best equipped to evaluate contradictory testimony. *Johnson*, 94 Wn. App. at 889-90.

In determining whether the officers waited an appropriate period before entering, the trial court must consider the purposes of the knock and announce rule: “(1) to reduce the potential for violence to both occupants and police; (2) to prevent unnecessary destruction of property; and (3) to protect the occupants’ right to privacy.” *Id.* at 890; *see also Cardenas*, 146 Wn.2d at 411. Strict compliance with the knock and announce rule is required absent exigent circumstances. *Cardenas*, 146 Wn.2d at 411-12. Exigencies include reasonable police suspicions ““that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.”” *Id.* at 411 (quoting *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997)). Unexcused failure to comply with the rule requires suppression of the evidence obtained after entry. *Richards*, 136 Wn.2d at 371.

Ms. Anderson contends that, considering the early hour and the absence of any

indication that the occupants were attempting to resist, escape, or destroy evidence, the two 10-second waiting periods were not reasonable. However, she fails to mention a crucial fact: the informant reported that Mr. Gonzalez-Guzman Sr. was armed with two pistols and had stated he would “go down in a blaze of glory” if officers came to his residence. CP at 119. Reasonable belief that a suspect possesses a weapon has excused compliance with the knock and announce rule. *State v. Schmidt*, 48 Wn. App. 639, 644, 740 P.2d 351 (1987) (citing Annot., *Sufficiency of Showing of Reasonable Belief of Danger to Officers or Others Excusing Compliance with “Knock and Announce” Requirement—State Criminal Cases*, 17 A.L.R.4th 301, 306 (1982)). *See also Cardenas*, 146 Wn.2d at 412 (one exigency was that the officers reasonably believed that the suspects were armed).

The reasonable belief that firearms were present and that the named suspect had formed an intent to resist with deadly force justified a relatively brief waiting period after the arresting officers knocked and announced their identity and purpose. Further, the officers offered no threat to property, because they entered a door that was already ajar. Under the circumstances, the two 10-second waiting periods after the two announcements were reasonable.

Prosecutorial Misconduct

Finally, Ms. Anderson contends the prosecutor committed misconduct during

closing argument by misstating the law. She argues that the prosecutor inferred there was a mandatory presumption of knowledge if the jury found that a reasonable person could infer knowledge under the circumstances.

The jury was properly instructed in part that it was “permitted but not required to find” that a person acted with knowledge if that person had “information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime.” CP at 50; *see State v. Johnson*, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992) (approving identical language). With this instruction, the jury was permitted, but not required, to find that Ms. Anderson subjectively knew that she possessed narcotics if there was sufficient evidence that would lead a reasonable person to that knowledge. *Johnson*, 119 Wn.2d at 174-75. After reading this instruction to the jury, the prosecutor described all the narcotics and paraphernalia found in Ms. Anderson’s bedroom and stated that any reasonable person would have known these items were there. The prosecutor then stated that Ms. Anderson had to prove not only that she did not know, but that a reasonable person in her place would not have known. Defense counsel raised no objection to this comment. However, on appeal, Ms. Anderson contends this statement suggests that she had to overcome a mandatory presumption of knowledge.

A defendant who alleges prosecutorial misconduct must establish both improper

conduct and its prejudicial effect. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Improper comments are considered prejudicial only if there is a substantial likelihood that they affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). When the defense fails to object to an improper comment, the error is considered waived unless the statement was so flagrant and ill-intentioned that the prejudice could not have been neutralized by a curative instruction. *Dhaliwal*, 150 Wn.2d at 578.

Because Ms. Anderson did not object to the prosecutor's statements during closing argument, she must show both that the statements were improper and that they were so outrageously improper that even a timely objection and admonition to the jury could not have reduced the prejudice. She fails to meet that burden here.

Prosecutors are given latitude in closing arguments to argue the facts in evidence and any reasonable inferences that arise from those facts. *Id.* at 577. Comments allegedly improper are viewed in the context of the entire argument. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). The prosecutor here correctly quoted the law as expressed in the court's instructions to the jury. He also quoted the court's instruction that Ms. Anderson carried the burden of proving unwitting possession by a preponderance of the evidence (meaning more probably true than not true). The knowledge element of unwitting possession is a subjective knowledge. *See Johnson*,

119 Wn.2d at 174. However, the jury is permitted to infer subjective knowledge if it finds that a reasonable person under the same circumstances would have subjectively known. *Id.* The prosecutor's reference to the fact that Ms. Anderson had to show not only that she did not know about the drug-related items, but also that a reasonable person would not have known, relates to the permissive inference of subjective knowledge.

The jury is presumed to follow its instructions. *State v. Grisby*, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). Here, the instructions are clear that the jury may, but need not, presume that Ms. Anderson was aware that there were drug-related items in her bedroom, because a reasonable person under these circumstances would have known. Even if the prosecutor's remarks might have contradicted to some degree his recitation of the instructions, the impact of those remarks could have been cured by an instruction to the jury. Accordingly, Ms. Anderson fails to prove prosecutorial misconduct that undercuts the validity of the verdict.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

No. 23953-5-III
State v. Anderson

Schultheis, J.

WE CONCUR:

Sweeney, C.J.

Kato, J.